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No. 86-1425

# In the Supreme Court of the United States

OCTOBER TERM, 1986

YAKIMA TRIBAL COURT OF THE YAKIMA INDIAN NATION, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES


Page

Cases:

*Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983) ..... 8
*Block* v. *North Dakota*, 461 U.S. 273 (1983) ..... 4, 5
*Dugan* v. *Rank*, 372 U.S. 609 (1963) ..... 6
*Iowa Mutual Insurance Co.* v. *LaPlante*, No. 85-1589 (Feb. 24, 1987) ..... 7
*Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) ..... 8
*Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) ..... 4, 5, 6
*MacDonald, Sommer & Frates* v. *County of Yolo*, No. 84-2015 (June 25, 1986) ..... 6
*Malone* v. *Bowdoin*, 369 U.S. 643 (1962) ..... 5, 6
*National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985) ..... 3, 4, 7, 8
*Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) ..... 8
*Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984) ..... 6
*Pulliam* v. *Allen*, 466 U.S. 522 (1984) ..... 5
*Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) ..... 6
*Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978) ..... 7
*United States* v. *Cherokee Nation*, No. 85-1940 (Mar. 31, 1987) ..... 8
*United States* v. *Kagama*, 118 U.S. 375 (1886) ..... 7
*United States* v. *Mississippi*, 380 U.S. 128 (1965) ..... 8
*United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) ..... 7
*United States* v. *Wheeler*, 435 U.S. 313 (1978) ..... 8
*United States* v. *White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) ..... 5, 9
*Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) ..... 8

Treaty, statutes and regulations:

Treaty with the Yakima Indian Nation, Jan. 9, 1855, art. 2, 12 Stat. 952 ..... 2

Treaty, statutes and regulations—Continued: Page

Administrative Procedure Act, 5 U.S.C. (Supp. III) 702 .. 4
25 U.S.C. 323-328 ..... 4
28 U.S.C. 1331 ..... 3
28 U.S.C. 1345 ..... 3
25 C.F.R.:
Section 169.3 ..... 4
Section 169.12 ..... 4
Section 169.13 ..... 4

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioners challenge the court of appeals' ruling that sovereign immunity barred a tribal court from enjoining federal government activities.

1. The Wapato Irrigation Project (Project), a federal project administered and operated by the Bureau of Indian Affairs, delivers irrigation water to the Yakima Indian Reservation. The Reservation is located in the southeastern part of the State of Washington and consists of more than 1.3 million acres of land. Approximately 80% of the Reservation is held in trust by the United States for the Yakima Tribe or its members.

An irrigation canal that is part of the Project has for years run across certain allotted land within the Reservation. In 1980, an employee of the Project and the tenants on the allotment at issue discussed relocation of a piece of the canal, from one place on the allotment to another, for the purpose of enhancing the land's value. The Project began the relocation, but before the work could be completed, the allotment owners ordered the workers off their

property. In April 1981, the allottees agreed, in exchange for $11,000, to permit conveyance of water through a temporary canal for a two-year period and completion of the relocation at the end of that period. Pet. App. 2a-3a.

Despite the agreement, in April 1983, three weeks before the end of the two-year period, the allottees filed a complaint in tribal court, naming the Project and the project engineer as defendants and seeking to prevent the completion of the canal relocation. The complaint was served at the Wapato Project Office. Although the named defendants did not appear in the tribal court proceeding, an Assistant Regional Solicitor of the Department of the Interior wrote to petitioner Judge Ward of the Yakima Tribal Court, asserting that the tribal court was without jurisdiction over the United States and suggesting that the proper forum was the federal district court. The Regional Solicitor noted that Article 2 of the Treaty with the Yakima Indian Nation, Jan. 9, 1855, 12 Stat. 952, allows employees of the "Indian Department" to be on the Reservation. See Pet. App. 4a; E.R. 11.[1]

On April 26, 1983, petitioner Judge Ward of the tribal court entered an order permanently restraining the project engineer and the Project from entering the allotment at issue. The United States then filed this action in the United States District Court for the Eastern District of Washington, contending that the tribal court's injunction was null and void and seeking declaratory and injunctive relief. On cross-motions for summary judgment, the district court granted the government the requested relief against the tribal court order. Pet. App. 20a-22a.

Acknowledging that the Yakima Tribe and its court were generally immune from suit (Pet. App. 20a), the district court nonetheless held that it had jurisdiction over the tribal court and tribal judge because the Tribe's im-

[1] "E.R." refers to the Excerpt of Record in the court of appeals.

munity did not "act as a shield against the United States" (*id.* at 21a), any more than the sovereign immunity of the individual states shielded them from suits by the United States (*ibid.*). On the merits, the district court held that, because of the sovereign immunity of the United States, the tribal court was without jurisdiction over the federal defendants (*ibid.*). The court concluded that the project engineer "was clearly operating within the scope of his official capacity and authority; therefore, the tribal court action against him was a prohibited, unconsented suit against the United States" (*ibid.*).

2. The court of appeals affirmed (Pet. App. 1a-17a). At the outset, the court held that, despite a recent agreement between the allottees and the Department of the Interior over a government right-of-way for the canal, the case was not moot.[2] The court of appeals also ruled (*id.* at 8a-9a) that the district court had subject matter jurisdiction both under 28 U.S.C. 1345, which provides for jurisdiction over suits brought by the United States, and under 28 U.S.C. 1331, which provides for jurisdiction over claims that " ' a tribal court has exceeded the lawful limits of its jurisdiction' " (Pet. App. 9a, quoting *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 853 (1985)).

On the merits of the government's challenge to the tribal court proceeding, the court of appeals held that the tribal court's exercise of jurisdiction over the Project and its

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[2] While the case was on appeal, the allottees agreed, in exchange for $18,000, to grant the Department of the Interior a right-of-way over the allotment. After receiving supplemental briefing, the court of appeals ruled that the appeal was not moot because the parties to the agreement were not the same as the parties to this federal lawsuit, the tribal court injunction was broader than the particular dispute and remained in effect, and declaring the appeal moot would result in vacating the district court order and hence leave the tribal court injunction in place. Pet. App. 6a-7a. We agree that the case is not moot.

engineer was prohibited by the sovereign immunity of the United States, since there was no consent to suit in the tribal court. Pet. App. 9a-15a.[3] The court rejected petitioners' argument that the ultra vires exception to the federal government's sovereign immunity (see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)) applied to this case. Petitioners had made "no substantial claim" of an unconstitutional taking, and if the allottees are due just compensation, a proper forum exists for them to claim it (Pet. App. 11a-12a). Moreover, although the Project engineer, in beginning relocation of the canal without the allottees' consent, may well have violated federal statutes and regulations (25 U.S.C. 323-328; 25 C.F.R. 169.3, 169.12, 169.13), he and other Project employees were clearly acting within the scope of their treaty authority to enter the Reservation without consent and within the scope of their valid Project authority "to relocate irrigation canals to better serve the Yakimas" (Pet. App. 13a-14a).

Having concluded that sovereign immunity plainly barred the tribal court proceeding, the court of appeals next held that, because tribal court jurisdiction in the case was thus " 'automatically foreclosed' " (Pet. App. 15a (quoting *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. at 855)), the United States was not required to exhaust tribal court remedies as a precondition to this federal suit (Pet. App. 15a, citing *United*

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[3] Congress has not consented to tribal court suits like that at issue here. Petitioners suggest (Pet. 12) that a provision of the Administrative Procedure Act, 5 U.S.C. (Supp. III) 702, gives the required consent. That provision, however, does not express the United States' consent to suit in *tribal* court, which is what would be required. See *Block* v. *North Dakota*, 461 U.S. 273, 289 (1983).

The tribal court suit was plainly against the United States. It sought to interfere with federal functions (the Project) and was brought against a federal entity and a federal officer acting in his official capacity. Pet. App. 9a-10a.

*States* v. *White Mountain Apache Tribe*, 784 F.2d 917, 920 n.10 (9th Cir. 1986)). Finally, the court of appeals held that the Tribe's sovereign immunity is no bar to this suit by the United States, a superior sovereign. " 'The Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers' " (Pet. App. 17a (quoting *White Mountain Apache Tribe*, 784 F.2d at 920)).[4]

3. Petitioner contends that the court of appeals erred in holding the tribal court suit barred by sovereign immunity, in failing to require the United States to exhaust tribal court remedies, and in refusing to recognize petitioners' immunity from suit in federal court. These contentions are without merit. The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

a. Petitioners contend (Pet. 10-14) that the court of appeals' holding that the tribal court suit was barred by the sovereign immunity of the United States is in conflict with this Court's decisions in *Larson* v. *Domestic & Foreign Commerce Corp., supra,* and *Malone* v. *Bowdoin*, 369 U.S. 643 (1962). Because the court of appeals expressly applied the rule articulated in those cases (Pet. App. 9a-15a), petitioners' only argument is that the court of appeals misapplied the rule. For the reasons given by the court of appeals, petitioners' argument is erroneous.

Although the United States and its agencies (and hence government officers, when the suit is effectively one against the government) are immune from suit "in the absence of an express waiver of this immunity by Congress" (*Block* v. *North Dakota*, 461 U.S. 273, 280 (1983)),

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[4] The court of appeals, citing *Pulliam* v. *Allen*, 466 U.S. 522, 541-542 (1984), also rejected petitioners' suggestion that a tribal judge has immunity from an injunction against acting in excess of jurisdiction (Pet. App. 17a).

this Court in *Larson* and *Malone* stated that a federal government officer may be sued for an action affecting property interests where the officer's actions are either unconstitutional or wholly outside the scope of his authority (see *id.* at 281; *Dugan* v. *Rank*, 372 U.S. 609, 621-622 (1963)).[5] In this case, however, as the court of appeals concluded (Pet. App. 11a-12a), there is "no substantial claim" that the Project actions on the allotted land violated the Constitution: the allottees have been paid (in April 1981 and December 1985) for a government right-of-way for the irrigation canal; and there is a forum for claiming any just compensation due to the allottees. See *MacDonald, Sommer & Frates* v. *County of Yolo*, No. 84-2015 (June 25, 1986), slip op. 10-11 (no constitutional taking claim where property owner has not pursued adequate remedy for just compensation); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-136 (1974). Moreover, although the Project officials "may have violated statutes and regulations regarding owner consent to right-of-way changes" (Pet. App. 14a), "[t]he Court in *Larson* made crystal clear that an officer might make errors and still be acting within the scope of his authority" (*Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 122 n.22 (1984); see *id.* at 101 n.11 (citation omitted) (officer acts "ultra vires only when he acts 'without any authority whatever' "); *Larson*, 337 U.S. at 690, 695). Petitioners merely reassert statutory and regulatory errors; they do not even challenge the court of appeals' determination, which is plainly correct, that the Project engineer "acted within the scope of his delegated authority" (Pet. App.

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[5] To the extent that the tribal court suit at issue in this case was brought against the Project, the *Larson-Malone* exception to the sovereign immunity bar is inapplicable. Petitioners' *Larson-Malone* argument applies only insofar as the tribal court suit was brought against a federal officer.

14a) in undertaking a relocation of a federal government irrigation canal on a Reservation allotment in order to enhance the value of the allotment.

b. Petitioners also contend (Pet. 7-10) that the court of appeals erred in not requiring the United States to exhaust tribal court remedies prior to challenging the tribal court's jurisdiction in federal court. We do not question that the exhaustion doctrine announced in *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians, supra* (see also *Iowa Mutual Insurance Co.* v. *LaPlante*, No. 85-1589 (Feb. 24, 1987)), generally applies to the Yakima Tribe and its courts, as petitioners argue (Pet. 9-10). The doctrine, however, applies only where the question of the tribal court's jurisdiction is "not automatically for[e]closed"; it does not apply where the tribal court's jurisdiction "is patently violative of express jurisdictional prohibitions" (*National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. at 855, 856 n.21). As the court of appeals correctly concluded (Pet. App. 15a-16a), this case falls squarely within that exception because of the clear sovereign immunity bar to the tribal court suit.

c. Petitioners finally contend (Pet. 14-16) that this suit against the tribal court and a tribal judge must be dismissed because the Tribe's immunity from suit can be limited only by " 'affirmative statutory authority' " (Pet. 15, quoting *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940)) and there is no such congressional action applicable to this case. Like the court of appeals (Pet. App. 16a), we do not question that Indian tribes generally possess sovereign immunity from unconsented suits, absent congressional action to the contrary. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58-59 (1978); *United States* v. *Kagama*, 118 U.S. 375, 382 (1886). That protection from suit, however, does not apply

to this lawsuit, which was brought by the United States, a superior sovereign, to eliminate an obstruction to its governmental activities.

Petitioners cite no decision of this Court or of any other court that supports their claim of tribal immunity from a federal government suit. And although no decision of this Court is squarely on point, this Court's decisions make clear that the court of appeals' rejection of petitioners' claim was correct. It is fundamental that, even in the absence of a governing treaty or statute, Indian tribes are "implicitly divested" of their inherent sovereignty to the extent that "the exercise of tribal s vereignty would be inconsistent with the overriding interests of the National Government" (*Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980)). See *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978); *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). Because Indian tribes are "fully subordinated to the sovereignty of the United States" (*Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 211), immunity from suits brought by the United States in order to protect its governmental activities is one of the attributes of tribes' sovereignty that must be deemed " ' withdrawn * * * by implication as a necessary result of their dependent status' " (*National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. at 852 n.14, quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). Loss of this aspect of sovereignty is implicit in the superior sovereignty of the United States for Indian tribes no less than it is for states (cf. *United States* v. *Cherokee Nation*, No. 85-1940 (Mar. 31, 1987), slip op. 7); and this Court has held that the ordinary sovereign immunity protection enjoyed by the states does not operate to shield states against suit by the United States (*United States* v. *Mississippi*, 380 U.S. 128 (1965)).

The tribal court in this case interfered with federal government activities. Accordingly, the court of appeals correctly held that the Tribe's sovereign immunity did not bar the federal court suit brought by the United States to free itself from that unlawful interference. See *United States* v. *White Mountain Apache Tribe, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

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